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Chapter VII
Provisional application of treaties

Addendum

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C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session

2. Text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties and commentaries thereto

1. The text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, at its seventieth session, together with commentaries thereto, is reproduced below.

Guide to Provisional Application of Treaties

General commentary

(1) The purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties.[1] They may encounter difficulties concerning, *inter alia*, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules and/or to the solutions that seem most appropriate for contemporary practice.

(2) Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force.[2] Its purpose is to allow States and international organizations to give legal effect to a treaty or a part of a treaty by applying its provisions, in view of the necessity created by certain acts, events or situations, before it has entered into force.[3] The concept has been defined as "the application of and binding adherence to a treaty's terms before its entry into force"[4] and as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time".[5] Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust,[6] among other objectives.[7] More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes an essentially voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

(3) The Guide to Provisional Application of Treaties consists of draft guidelines that have been adopted by the Commission and are reproduced below, accompanied by commentaries. Although they are not legally binding as such, the draft guidelines reflect existing rules of international law. The draft guidelines are mainly based on article 25 of both the Vienna Convention on the Law of Treaties of 1969 (the "1969 Vienna

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[1] As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

[2] See D. Mathy, "Article 25", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 640.

[3] See A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012).

[4] R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1.

[5] See M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354.

[6] See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

[7] See A/CN.4/664, paras. 25–35.

Convention")[8] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (the "1986 Vienna Convention"),[9] which they try to clarify and explain, and on the practice of States and international organizations on the matter, without prejudice to other rules of international law.

(4) It is of course impossible to address all the questions that may arise in practice and cover the myriad of situations that may be faced by States and international organizations. Yet, that is consistent with one of the main aims of the present draft guidelines, which is to keep the flexible nature of the provisional application of treaties[10] and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide allows States and international organizations to set aside, by mutual agreement, the solutions identified in certain draft guidelines if they so decide.

(5) The Guide should also help to promote the consistent use of terms and therefore avoid confusion. The extensive use of terms,[11] such as "provisional entry into force" as opposed to "definite entry into force", has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties. In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[12] Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while it constitutes the legal basis of the matter,[13] has been criticized as difficult to understand[14] and lacking legal precision.[15] The intention of the present draft guidelines is to provide greater clarity in that regard.

(6) To provide assistance to States and international organization in their practice on provisional application, this Guide will also include draft model clauses, which are to be reproduced in an annex.[16] Those draft model clauses reflect best practices with regard to the provisional application of both bilateral and multilateral treaties. They are in no way intended to limit the flexible voluntary nature of provisional application of treaties, and they do not pretend to address the whole range of situations that may arise.

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[8] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[9] A/CONF.129/15 (not yet in force).

[10] See A/CN.4/664, paras. 28–30.

[11] In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975–2010* (Abuja, Ministry of Foreign Affairs of Nigeria), 2011, which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see A/CN.4/699, paras. 168–174).

[12] See paragraph 33 of the letter from the Federal Republic of Yugoslavia in the Exchange of Letters Constituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (*ibid.*, vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (A/CN.4/658 and A/CN.4/676), and the memorandum by the Secretariat on the practice of States and international organizations in respect of treaties that provide for provisional application (A/CN.4/707).

[13] See Mertsch, *Provisionally Applied Treaties* ... (see footnote 3 above), p. 22.

[14] See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111.

[15] See M.A. Rogoff and B.E. Gauditz, "The provisional application of international agreements", *Maine Law Review*, vol. 39 (1987), No. 1, p. 41.

[16] The Commission was not able to conclude its consideration of draft model clauses because of a lack of time. It therefore intends resuming such consideration at its seventy-first session, to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during its seventy-second session.

(7) A selected bibliography is attached to these commentaries.*

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the draft guidelines. In establishing the intended parameters of the draft guidelines, the provision should be read together with draft guideline 2, which sets out the purpose of the draft guidelines.

(2) The word "concern" was considered more suitable for a text aimed at providing guidance to States and international organizations than other formulations, such as "applies to", which is more frequently found in texts laying down rules applicable to States and other subjects of international law.

(3) The Commission decided not to include a further qualification limiting the scope *ratione personae* of the draft guidelines to States. Instead, the draft guidelines also pertain to international organizations, as is evident from the references to both States and international organizations in draft guidelines 5, 6, 7, 9, 10,[17] 11 and 12. That accords with the fact that the provisional application of treaties is envisaged in article 25 of both the 1969[18] and the 1986 Vienna Conventions.[19]

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Commentary

(1) Draft guideline 2 concerns the purpose of the draft guidelines and follows the practice of the Commission of including such types of provisions in its texts with a view to clarifying the purpose of the text in question. In the present case, the purpose of the draft

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* Forthcoming.

[17] The question of the potential role to be played by an international organization or an international conference in an agreement to provisionally apply a treaty or a part of a treaty is addressed in draft guideline 4.

[18] Article 25 of the 1969 Vienna Convention reads as follows:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[19] Article 25 of the 1986 Vienna Convention reads as follows:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

guidelines is to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) Draft guideline 2 is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the draft guidelines, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties. That is suggested by the decision to include a reference to both "the law and practice" on the provisional application of treaties. Such an approach is also alluded to in the reference to "other rules of international law", which reflects the understanding within the Commission that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the draft guidelines recognize the central importance of article 25 of the 1969 and the 1986 Vienna Conventions. The reference to "on the basis of", and the express reference to article 25, is intended to indicate that this article serves as the basic point of departure of the draft guidelines, even if it is to be supplemented by other rules of international law in order to obtain a full appreciation of the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. In so doing, the Commission deliberately sought to follow the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the draft guidelines is article 25. That is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not necessarily reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be provisionally applied. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions, while it uses the word "may" to underline the optional character of provisional application. The Commission also considered how to best capture in the text the States or international organizations that could provisionally apply a treaty, and the States or international organizations whose agreement is required in order for such provisional application to take place, and therefore retained a more general formulation.

(3) Unlike in article 25, which alludes, in paragraph 1 (*b*), to an agreement to provisionally apply a treaty existing among "negotiating States" or "negotiating States and negotiating organizations", no reference is made in draft guideline 3 to which States or international organizations may provisionally apply a treaty. In the process of considering whether to align the present formulation with that found in article 25, by qualifying the applicability of the general rule to a particular group of States or international organizations, the Commission acknowledged the possibility, arising from contemporary practice, that provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question. The question as to whether the term "negotiating States" in article 25, paragraph 1 (*b*), would prevent non-negotiating States or non-negotiating international organizations

from entering into an agreement on provisional application could not be clearly answered based on the multilateral treaties taken into consideration.[20] Furthermore, the need to distinguish between different groups of States or international organizations, in terms of their connection with the treaty, was considered less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that historically have been provisionally applied. However, relevant practice was identified by examining certain commodity agreements that had never entered into force but were extended beyond their termination date.[21] In such cases, when States extended an agreement that had only been provisionally applied, such an extension was also understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement.

(4) The distinction between provisional application of the entire treaty, as opposed to a "part" thereof, originates in article 25. The Commission, in its work on the law of treaties, specifically envisaged the possibility of what became known as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the "same rule" on what it then termed "provisional entry into force" applied to "part of a treaty".[22] In the corresponding commentary, it was explained that: "[n]o less frequent to-day is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation".[23] The Commission remains of the same view. The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms, that may be less amenable to provisional application. The provisional application of a part of a treaty is accordingly reflected in the formula "provisional application of a treaty or a part of a treaty", which is used throughout the draft guidelines.[24]

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[20] See A/CN.4/707, para. 37.

[21] See, for example, the International Tropical Timber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30–37.

[22] *Yearbook ... 1966*, vol. II, para. 38.

[23] Paragraph (3) of the commentary to draft article 22, *ibid.*

[24] An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (*ibid.*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part of a treaty from provisional application can be found in the Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); Convention on Cluster Munitions, (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); Arms Trade Treaty (A/CONF.217/2013/L.3, art. 23); and the Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe (ILM, vol. 36, p. 866, sect. VI, para. 1). Similarly, the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the Trans-Pacific Strategic Economic Partnership Agreement (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement.

(5) The second phrase, namely "pending its entry into force between the States or international organizations concerned", is based on the chapeau of article 25. The Commission considered the possible ambiguity in the reference to "entry into force". While the expression could be referring, on the one hand, to the entry into force of a treaty itself,[25] examples exist of provisional application continuing for some States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations, as is the case for treaties in the multilateral context.[26] The reference to "entry into force" in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned. The reference at the outset to "pending its entry into force" is also meant to underscore the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives.

(6) The third and fourth phrases ("if the treaty so provides, or if in some other manner it has been so agreed") reflect the two possible bases for provisional application recognized in paragraph 1 (*a*) and (*b*) of article 25. The possibility of provisional application on the basis of a provision in the treaty in question is well established,[27] and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

(7) A modified, more general formulation was adopted for the alternative scenario of provisional application on the basis of a separate agreement. Unlike the 1969 and 1986 Vienna Conventions, no specific mention is made of a particular group of States or international organizations, acknowledging the contemporary practice that has included cases of provisional application being agreed to either by only some negotiating States or by non-negotiating States that subsequently signed or acceded to the treaty. Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely unconnected to the treaty, provisionally applying it after having agreed in some other manner with one or more negotiating States or international organizations. That explains the more neutral drafting of draft guideline 3, in the passive form, which simply restates the basic rule.

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[25] As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid.*, vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force.

[26] For example, the Arms Trade Treaty.

[27] Examples in the bilateral sphere include: Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports (United Nations, *Treaty Series*, [vol. not published yet], No. 51407), art. 8; Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste (*ibid.*, [vol. not published yet], No. 50313), art. 13; Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7; Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13–14), art. 18, para. 7, and its corresponding Protocol on Claims, Legal Proceedings and Indemnification (*ibid.*, p. 35), art. 4, para. 8; Statutes of the Community of Portuguese-Speaking Countries (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and Agreement establishing the "Karanta" Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

(8) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby expanding on the meaning of agreement "in some other manner".

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with additional forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might expressly permit provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) As previously indicated, draft guideline 4 elaborates on the reference to "in some other manner it has been so agreed" at the end of draft guideline 3, which is expressly envisaged in article 25, paragraph 1 (*b*). That is confirmed by the opening phrase "[i]n addition to the case where the treaty so provides", which is a direct reference to the phrase "if the treaty itself so provides" in draft guideline 3. That follows the language of article 25. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(3) Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the treaty that is provisionally applied.[28]

(4) Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application.[29] By way of providing further guidance, reference is made

[28] Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany (*ibid.*, [vol. not yet published], No. 49430) and the Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar (*ibid.*, vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (*ibid.*, [vol. not yet published], No. 51181); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas; and the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force).

[29] In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (United Nations, *Treaty Series*, [vol. not yet published], No. 51578); Agreement between the Government of Latvia and the Government of the

to two examples of such "means or arrangements", namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.[30] It is of course understood that any such resolution or declaration has to be consistent with the rules of the international organization or the intergovernmental conference concerned.

Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (*ibid.*, vol. 2461, No. 44230, p. 205); and Agreement between the United Nations and the Government of the Republic of Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, "The provisional application of treaties", in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nijhoff, 1998), p. 81.

[30] These are not agreements in which the international organization is a party to the treaty as such. Rather, these are agreements between States reached in meetings or conferences under the auspices of that international organization. Several such instances can be given. First, the amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement (United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105). See D. Sagar, "Provisional application in an international organization", *Journal of Space Law*, vol. 27, No. 2 (1999), pp. 99-116. Second, there are a number of precedents in which the competent organs of international organizations provisionally applied amendments, without explicit power being provided for in their constitutions, namely the Congress of the Universal Postal Union, the Committee of Ministers of the Council of Europe, and the practice of the International Telecommunication Union. See Sagar, "Provisional application in an international organization", pp. 104–106. Third, the amendment adopted in 2012 by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162), in which the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap in the operation of the clean development mechanism that might arise in relation to the entry into force of amendments to the Kyoto Protocol, recommended that those amendments could be provisionally applied. See "Legal considerations relating to a possible gap between the first and subsequent commitment periods" (FCCC/KP/AWG/2010/10), para. 18. Fourth, the Amendment to Article 14 of the Statutes of the World Tourism Organization (United Nations, *Treaty Series*, [vol. not published yet], No. 14403). Other examples, where Governments are given the possibility to bring the agreement provisionally into force by virtue of a collective decision, include: (a) International Agreement on Olive Oil and Table Olives (*ibid.*, vol. 2684, No. 47662, p. 63); (b) International Tropical Timber Agreement; (c) International Cocoa Agreement, 1993 (*ibid.*, vol. 1766, No. 30692, p. 3); and (d) International Cocoa Agreement, 2010 (*ibid.*, vol. 2871, No. 50115, p. 3). Lastly, a case that two academic sources qualify as one of provisional application refers to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test Ban Treaty Organization, which was done through the adoption of a resolution by the Meeting of States Signatories (CTBT/MSS/RES/1) on 19 November 1996. Although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect, these scholars argue that because the decisions of the Preparatory Commission are intended to implement core provisions of the Comprehensive Nuclear-Test Ban Treaty before its entry into force, the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement "in some other manner", or of an "implied provisional application" on the basis of article 25, 1 (b) of the 1969 Vienna Convention. See A. Michie," The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol.10, (2005), pp. 347–377, at pp. 369–370. See also, Y. Fukui, "CTBT: Legal questions arising from its non-entry into force revisited", *Journal of Conflict and Security Law* (forthcoming) pp. 1–18, at pp. 13–15. By contrast, another source, published under the auspices of the United Nations Institute for Disarmament Research and containing a preface by the Executive Secretary of the Preparatory Commission, maintains that the Comprehensive Nuclear-Test Ban Treaty is not currently being provisionally applied. See R. Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, UNIDIR/2009/2 (2009), pp. 227–231.

(5) While the practice is still quite exceptional,[31] the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Commentary

(1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

(2) The first clause reflects the approach taken in the draft guidelines of referring to the provisional application of the entire treaty or a part of a treaty.

(3) The second clause has two components. The reference to "pending its entry into force" follows the formulation found in draft guideline 3, whereby "entry into force" refers to the entry into force between the States or international organizations concerned. As indicated in the commentary to draft guideline 3, such considerations are pertinent primarily in the context of the provisional application of multilateral treaties. The Commission decided to retain the general reference to "entry into force", as already indicated in the commentary to draft guideline 3.[32]

(4) The second component is the inclusion of the reference to both States and international organizations. That reflects the position taken by the Commission, referred to in paragraph (3) of the commentary to draft guideline 1, whereby the scope of the draft guidelines should include treaties between States and international organizations or between international organizations. The reference to entry into force "between" the States or international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force.

(5) The phrase "takes effect on such date, and in accordance with such conditions and procedures" concerns the triggering of the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which refers to "takes effect". The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally.

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[31] See the second report by the Special Rapporteur (A/CN.4/675), paras. 35 (c) and 36–41, and the third report by the Special Rapporteur (A/CN.4/687), paras. 5 and 120, on the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (*United Nations Treaty Series, vol. 1974, No. 33757)*. See also the Protocol to the Agreement on a Unified Patent Court on Provisional Application (www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).

[32] See paragraph (5) of the commentary to draft guideline 3.

The Commission decided not to refer expressly to the various modes of expressing consent to be bound by a treaty, in order to retain a more streamlined provision.

(6) The concluding phrase "as the treaty provides or as are otherwise agreed" confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments.

Guideline 6
Legal effect of provisional application

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Commentary

(1) Draft guideline 6 deals with the legal effect of provisional application. Two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being provisionally applied. Without excluding the legal effect of the agreement to provisionally apply a treaty or a part thereof, draft guideline 6 relates to the legal effect of a treaty or a part of a treaty that is provisionally applied.

(2) The draft guideline begins by stating that the legal effect of provisional application of a treaty or a part of a treaty is to produce a legally binding obligation to apply the treaty or part thereof as if the treaty were in force between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced. Such legal effect is derived from the agreement to provisionally apply the treaty by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effect of provisional application, which is common, the draft guideline provides that the provisional application produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force.[33]

(3) The previous position is qualified by the concluding phrase "unless the treaty provides otherwise or it is otherwise agreed", which confirms that the basic rule is subject to the treaty, which may provide an alternative legal outcome. Such an understanding, namely a default in favour of the creation of a legally binding obligation to apply the treaty as if it were in force, subject to the possibility that the parties may agree otherwise, is reflected in existing State practice.[34]

(4) The opening phrase "the provisional application of a treaty or a part of a treaty" follows draft guideline 5. The phrase "a legally binding obligation to apply the treaty or part thereof as if the treaty were in force", which is central to the draft guideline, alludes to the effect that the treaty would produce were it in force for the State or the international organization concerned and to the conduct that is expected from States or international

[33] See Mathy, "Article 25" (footnote 2 above), p. 651.

[34] See the treaties analysed in the Memorandum by the Secretariat (A/CN.4/707), which contains an analysis of more than 400 bilateral and 40 multilateral treaties, while recognizing that in reality the number of both bilateral and multilateral treaties provisionally applied is higher than the number available in the United Nations *Treaty Series*; See also the examples contained in the reports submitted by the Special Rapporteur: A/CN.4/664, A/CN.4/675, A/CN.4/687 and A/CN.4/699 and Add.1. The latter contains an annex with examples of recent European Union practice on provisional application of agreements with third States. See also the examples of the practice of the European Free Trade Association (EFTA) referred to in the fifth report by the Special Rapporteur (A/CN.4/718).

organizations that decide to resort to provisional application. The reference to "between the States or international organizations concerned" was inserted in order to align the draft guideline with draft guideline 5. The concluding clause, "unless the treaty provides otherwise or it is otherwise agreed", indicates the condition on which the general rule is based, namely that the treaty does not provide otherwise.

(5) Nonetheless, an important distinction must be made. As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application "produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force" does not imply that provisional application has the same legal effect as entry into force. The reference to a "a legally binding obligation" is intended to add more precision in the depiction of the legal effect of provisional application.

(6) The Commission considered the possibility of introducing an express safeguard so that the provisional application of a treaty could not result in the modification of the content of the treaty. However, the formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal with the point, since provisional application is limited to producing a legally binding obligation to apply the treaty or part thereof as if the treaty were in force. Implicit in the draft guideline, therefore, is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.[35] Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is provisionally applied, in accordance with part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Commentary

(1) Draft guideline 7 deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty.

(2) Owing to the relative lack of practice on the matter and the fact that reservations in the case of provisional application were not addressed in the 2011 Guide to Practice on Reservations to Treaties,[36] the Commission is only at the initial stage of considering the question of reservations in relation to the provisional application of treaties. Different and quite divergent views were expressed in the Commission as to whether it was appropriate or necessary to include a provision on reservations in the context of provisional application of a treaty or a part thereof in the Guide, although it was generally believed that, as a matter

[35] However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. VI.

[36] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1).

of principle, nothing prohibits the possibility of formulating reservations related to provisional application.

(3) Although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations must be distinguished from reservations.[37] Nor do declarations to opt out of provisional application constitute reservations in the sense of the law of treaties.[38]

(4) Paragraph 1 begins with the phrase "[i]n accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*". This phrase is meant to invite further examination and discussion of the rules of the 1969 Vienna Convention applicable to reservations in case of provisional application. The phrase was placed at the beginning of the paragraph to clearly indicate that the relevant rules of the Vienna Convention being referred to are those that qualify the formulation of reservations, and not those that relate to the provisional application of certain provisions of the respective treaty.

(5) The phrase "a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty" is based on articles 2, paragraph 1 (d), and 19 of the Vienna Convention. The reference to the legal effect "produced by the provisional application" underlines the intrinsic link between draft guideline 6 and draft guideline 7. The formulation is considered to be relatively neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such.

(6) Paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1. Paragraph 2 replicates paragraph 1, with the necessary modifications. The opening phrase "[i]n accordance with the relevant rules of international law", is to be understood broadly to include primarily the rules of the law of treaties, but also those pertaining to the law of the international responsibility of international organizations.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Commentary

(1) Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being provisionally applied. It reflects the legal implication of the application of draft guideline 6. If the treaty or a part of a treaty being provisionally applied is considered as being legally binding, then a breach of an obligation arising under the treaty or a part of a treaty being provisionally applied would necessarily constitute a wrongful act giving rise to international responsibility. The Commission considered whether it was necessary to have a provision on responsibility at all. The inclusion of the present draft guideline was deemed necessary since it dealt with a key legal consequence of the provisional application of a treaty or a part of a treaty. Since article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly, the prevailing view was that the scope of the draft guidelines was not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

[37] See, in particular, guideline 1.3 of the Guide to Practice on Reservations to Treaties (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1)).

[38] See *e.g.* art. 45, para. 2 (a) of the Energy Charter Treaty (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95); and art. 7, para. 1 (a), of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

(2) The Commission decided to retain the reference to "a part" of a treaty in order to specify that when a part of a treaty is being provisionally applied, it is only that part that is susceptible to giving rise to international responsibility in case of a breach, as conceived under the present draft guideline.

(3) The draft guideline was aligned with the articles on responsibility of States for internationally wrongful acts of 2001 [39] and with the articles on responsibility of international organizations of 2011,[40] to the extent that they reflect customary international law. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from those draft articles. Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to those draft articles.

Guideline 9
Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Commentary

(1) Draft guideline 9 concerns the termination and suspension of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, when the treaty enters into force for the State or international organization concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being provisionally applied. The possibility that other, less common, means of terminating provisional application is not excluded.

(2) Paragraph 1 addresses termination of provisional application upon entry into force. Entry into force is the most frequent way in which provisional application is terminated.[41] That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty itself is implicit in the reference in draft guidelines 3 and 5 to "pending its entry into force", which is based on article 25 of the 1969 and 1986 Vienna Conventions.[42] In accordance with draft guideline 5, provisional application

[39] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

[40] *Yearbook ... 2011*, vol. II (Part Two), para. 87.

[41] See A/CN.4/707, para. 88.

[42] Most bilateral treaties state that the treaty shall be provisionally applied "pending its entry into force", "pending its ratification", "pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Governments ... informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article" or "until its entry into force" (see A/CN.4/707, para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force), which provides in paragraph (*d*) that: "Such a declaration [of provisional application] will cease to be

continues until the treaty enters into force for the State or international organization provisionally applying the treaty or a part of a treaty in relation to the other States or international organizations provisionally applying it or a part of it as well.[43]

(3) The phrase "in the relations between the States or international organizations concerned" was included to distinguish the objective entry into force of the treaty from the subjective entry into force for one or more parties to the treaty. This was viewed as being particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continue to be applied only provisionally by others. This phrase is thus intended to capture all the possible legal situations that may exist in the regard.

(4) Paragraph 2 reflects the second instance mentioned in paragraph (1) of the commentary to the present draft guideline, namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions.

(5) The opening phrase of paragraph 2 "[u]nless the treaty otherwise provides or it is otherwise agreed" omits the reference to such an alternative agreement only being concluded between the "negotiating" States and international organizations, which can be found in the 1969 and 1986 Vienna Conventions. The formulation "or it is otherwise agreed" continues to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty. Given the complexity of concluding modern multilateral treaties, it was not clear to the Commission that contemporary practice continued to support the narrow language of the Vienna Conventions, both in terms of whether all negotiating States or international organizations were to be treated as being on the same legal footing in relation to provisional application and out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.[44]

(6) The Commission was also concerned with identifying which States or international organizations should be notified of another's intention to terminate the provisional application of a treaty or a part of a treaty. The final phrase in the draft guideline, "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally", clarifies that point.[45]

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effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned."

[43] See, e.g., the Agreement between the Federal Republic of Germany and the Government of the Republic of Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products Stored in Germany on its Behalf (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333–334).

[44] Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraphs (2) and (5) of the commentary to draft guideline 3, above.

[45] A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (*ibid.*, [vol. not yet published], No. 51490, p. 14), art. 17. Other examples include: Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, at p. 173); Agreement between Spain and the International Oil Pollution Compensation Fund (*ibid.*, vol. 2161, No. 37756, p. 45, at p. 50); and Treaty between the Kingdom of Spain and the North Atlantic Treaty Organization Represented by the Supreme Headquarters Allied

(7) The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

(8) Paragraph 3 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension. Despite an apparent lack of relevant practice and notwithstanding the fact that article 25, paragraph 2, of the Vienna Convention provides a flexible way to terminate provisional application, the Commission considered it useful to include a provision covering termination and suspension in the case of a material breach in the Guide to address a number of possible scenarios not covered by paragraphs 1 and 2. For example, a State or international organization may only wish to terminate provisional application, but still intend to become a party to the treaty. Another conceivable scenario is that in which a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied.

(9) The formulation of paragraph 3 as a "without prejudice" clause is intended to preserve the possibility that not only article 60 but also other provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied. Instead, the rules of the Vienna Convention are to be "applied *mutatis mutandis*" depending on the circumstances.

(10) The reference to "or other relevant rules of international law" is primarily intended to extend the scope of the provision to the provisional application of treaties by international organizations. It acknowledges that the 1986 Vienna Convention has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart. The reference also makes clear that the provision is without prejudice to other methods of terminating provisional application more generally.[46]

(11) The scope of the provision is limited to section 3 of part V of the 1969 Vienna Convention to avoid any legal uncertainty that might have resulted from a general reference to part V. The Commission recognized that other provisions of part V, in particular the procedural provisions in section 4, are not applicable to States not parties to the 1969 Vienna Convention. Similarly, the specific reference to section 3 serves to exclude the

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Powers Europe on the Special Conditions Applicable to the Establishment and Operation on Spanish Territory of International Military Headquarters (*ibid.*, vol. 2156, No. 37662, p. 139, at p. 155). As for the termination of multilateral treaties, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (*ibid.*, vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with the International Agreement on Olive Oil and Table Olives.

[46] See, for example, art. 29 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (*ibid.*, vol. 1946, No. 33356, p. 3), which envisages additional means of terminating provisional application of multilateral treaties that are in force with respect to the territory to which the succession of States relates.

applicability of section 2 of part V of the Vienna Convention, on invalidity. The Commission considered invalidity in draft guideline 11.

Guideline 10
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Commentary

(1) Draft guideline 10 deals with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969[47] and 1986[48] Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27,[49] draft guideline 10 states that the provisional application of a treaty by a State or international organization cannot, as a general rule, depend on, or be conditioned by, their internal law or rules. Whatever the provisions of the internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[50] However, as indicated in draft guideline 12, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

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[47] Art. 27 of the 1969 Vienna Convention provides as follows:

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[48] Art. 27 of the 1986 Vienna Convention provides as follows:

Internal law of states, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

[49] See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 688–701, at p. 689.

[50] See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 43).

(4) While it is true that each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,[51] once a treaty or a part of a treaty is provisionally applied, an inconsistency with the internal law of a State or of the rules of an international organization cannot justify a failure to provisionally apply such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to provisionally apply a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization.[52] Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.[53]

(6) The reference in the draft guideline to the "internal law of States and rules of international organizations" stands for any provision of this nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase "obligation arising under such provisional application", in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to provisionally apply the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces the same legal effect as if the treaty were in force between the States and the international organization concerned.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 11 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 11 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,[54] and the second, paragraph 2 of

[51] See Mertsch, *Provisionally Applied Treaties* ... (see footnote 3 above), p. 64.

[52] See Mathy, "Article 25", (footnote 2 above), p. 646.

[53] See article 3 of the draft articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and draft article 5 of the draft articles on responsibility of international organizations of 2011 (*Yearbook ... 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

[54] Article 46 of the 1969 Vienna Convention provides as follows:

article 46 of the 1986 Vienna Convention.[55] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

(3) Draft guideline 11 states that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation of that type is "manifest" if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.[56]

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

Commentary

(1) Draft guideline 12 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. It acknowledges that such limitations may exist and, consequently, recognizes the right of States and international organizations to agree to provisional application subject to limitations that derive from internal law or rules of the organizations, and reflecting them in their consent to provisionally apply a treaty or a part of a treaty.

(2) Notwithstanding the fact that the provisional application of a treaty or part of a treaty may be subject to limitations, such as obtaining parliamentary consent, the present draft guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their

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Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[55] Article 46 of the 1986 Vienna Convention provides as follows:

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

[56] According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization or even make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.[57]

(3) The word "agreement" in the title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or the rules of the international organization concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to provisionally apply a treaty or a part of a treaty.

(5) The present draft guideline should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization.

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[57] See, for example, art. 45 of the Energy Charter Treaty. See also the several examples of Free Trade Agreements between the EFTA States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: "if its constitutional requirements permit", "if its respective legal requirements permit" or "if their domestic requirements permit" (http://www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom Union States, reads as follows:

> Article 43 (Entry into force)
>
> [...]
>
> 2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depository.
>
> [...]